Supreme Court, U.S.
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No. 01-

IN THE

# Supreme Court of the United States

TANYA CAMP,

*Petitioner,*

*v.*

WAL-MART STORES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

What standard should federal courts use in determining whether or not to certify a state law question to the state's highest court in a diversity jurisdiction suit?

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Petitioner Tanya Camp, (hereinafter referred to as "Petitioner"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

This civil case was tried to a jury and judgment was entered against Wal-Mart Stores, Inc. (hereinafter referred to as "Respondent"), in the amount of $125,000 ($25,000 compensatory, $100,000 punitive) on the jury's verdict of August 16, 2000. A copy of the judgment is attached hereto as Appendix B. On September 10, 2001, the Eleventh Circuit reversed the judgment of the district court in an "unpublished" opinion, which is attached hereto as Appendix A. This ruling was based solely on a question of state law. Petitioner then filed a motion to certify the question to the Georgia Supreme Court and a motion for rehearing *en banc*. The motion to certify the question to the Georgia Supreme Court was denied on October 22, 2001 (Appendix C) and the motion for rehearing *en banc* was denied on November 5, 2001 (Appendix D).

## STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari is filed within ninety days (90) days of the order denying Petitioner's motion for rehearing *en banc* and thus is timely under Supreme Court Rule 13(1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1 of the United States Constitution provides in relevant part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article X of the United States Constitution provides: "The power is not delegated to the United States by the Constitution, nor prohibited by it to the states or reserve to the states respectively, or to the people."

## STATEMENT OF THE CASE

This lawsuit arose when Petitioner, Tanya Camp, entered a Wal-Mart Super Center with her infant daughter. Petitioner purchased a grocery cart full of food stuffs and other items. When she arrived at the cash register to check out, two Wal-Mart employees were present and assisted her. Noticing that Petitioner had an infant in a carrying seat lying in the bottom part of the grocery cart, one of the employees walked around the counter and unloaded Petitioner's grocery cart while the other employee scanned the items into the register. After Petitioner paid for her purchases, the employees bagged the items and placed them back into the grocery cart.

As Ms. Camp left the store, she was accosted by a Wal-Mart Loss Control employee who informed her that there were items in the grocery cart that had not been paid for at the check out counter. Shocked that she and the two employees had overlooked the items, Petitioner returned from the vestibule area of the store so that she could pay for them. Instead of being allowed to pay for the items, however, Petitioner was taken to a small room in the back of the store and accused of being a

shoplifter. The store then preferred charges against Petitioner for shoplifting.

On April 14, 1999, Petitioner was prosecuted for shoplifting in the Superior Court of Bartow County. In the criminal trial, Petitioner represented herself *pro se*. The jury returned a verdict of "not guilty" and the instant lawsuit was subsequently filed in the Superior Court of Bartow County, and removed to the United States District Court for the Northern District of Georgia, Rome Division.

On August 16, 2000, a federal trial jury awarded Tanya Camp $125,000 in a malicious prosecution case against Wal-Mart. (R2-35, 36). The case was before the district court solely on state law claims, having been removed by Respondent pursuant to diversity jurisdiction. (R1-1). Three times during the course of the trial proceedings, Judge Harold L. Murphy, a former Georgia superior court judge and Georgia legislator, had been asked by Wal-Mart to dismiss the malicious prosecution claim. In each instance, a motion for summary judgment (R1-17), motion for directed verdict and motion for new trial (R2-46), Judge Murphy denied those requests though he did grant Respondent substantial relief on the other claims. The trial court based its ruling on the numerous Georgia Court of Appeals decisions rendered over the past few years, all of which indicate that Petitioner's case should have been submitted to the jury. (R2-46-7, 9, 10).

A panel of the Eleventh Circuit reversed Judge Murphy, in full effect depriving Petitioner of the verdict she won. The panel did so without referring the dispositive state law question — whether probable cause for the arrest existed under Georgia law to the Georgia Supreme Court. The panel took this action without oral argument and in a per curium, unpublished opinion.

## REASON FOR GRANTING THE WRIT

## THE UNITED STATES SUPREME COURT SHOULD GRANT REVIEW TO ESTABLISH THE STANDARDS BY WHICH FEDERAL COURT SHOULD "CERTIFY" DISPOSITIVE QUESTIONS OF STATE LAW TO THE STATE'S HIGHEST COURT

In 1938 the United States Supreme Court made a landmark shift in diversity jurisprudence. Until that time, federal courts applied the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18, 10 L. Ed. 865 (1842), which held that

> federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the state is — or should be. . . .

*Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 58 S. Ct. 817, 819 (1938). In reversing this long standing rule, the court noted the "fallacy underlying" it.

> The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in federal courts "the parties are entitled to an independent judgment on matters of general law":

> But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
>
> The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

*Erie*, at 79.

This new doctrine gave teeth to the Tenth Amendment. Whereas previously a diversity eligible defendant could simply remove a case if the so-called federal common law were more favorable than state law, now an equal standard would be applied, regardless of where the case was pending. For their own part, states welcomed this change, adopting procedures through which federal courts could refer questions of state law for determination. Accordingly, Georgia, like so many of its sister states, now has such a provision regarding its own Supreme Court: "The Supreme Court shall have jurisdiction to answer any question of law from any state or federal appellate court." (The Georgia Constitution, Article 6, § 6, para. 4.)

In the instant case, Petitioner virtually begged the Eleventh Circuit to certify the question in the case at bar to the Georgia Supreme Court before throwing out a $125,000 verdict on a state law question. Surprisingly, the Eleventh

Circuit refused to certify the question. Its action was particularly troubling in view of prior decisions and circumstances surrounding the case.

First, a member of the panel deciding this case had held in a previous opinion that the certification process should be utilized whenever there was any doubt as to state law. Specifically, the opinion noted:

> [W]hen . . . doubt exists as to the application of state law, federal courts should certify the question to the state supreme court to avoid making unnecessary law guesses and offer the state court the opportunity to interpret or change existing law . . . only through certification can federal courts get definitive answers to unsettled state law questions. Only the state supreme court can provide what we can be assured or "correct" answers to state law questions, because the state's highest court is the one true and final arbiter of state law.

*Pogue v. Oglethorpe Power*, 82 F.3d 1012, 1017 (11th Cir. 1996).[1]

Second, the Georgia law question at issue was clearly a close one. It is, in essence, "to what extent under Georgia law is probable cause lacking where a reasonable person would be required to investigate further before initiating a shoplifter's arrest and prosecution?" This issue is obviously one upon which reasonable judges could disagree. The trial

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1. Ironically, *Pogue* not only involved a member of the panel deciding the case at bar, but also a case in which the undersigned counsel opposed certification.

court judge, prior to his service on the federal bench, had been a Georgia Superior Court judge for six years and a member of the Georgia House of Representatives for ten years. (Federal Judges Biographical Data Base, Federal Judicial Website, *http://air.fjc.gov/history/judges-frm.html.*) Thus, he was no stranger to Georgia law in general or malicious prosecution claims in particular. He allowed the case to proceed to trial, whereas the panel felt otherwise. A question this close, should be submitted to the state's highest court for appropriate resolution and circuit courts that refuse to do so abuse their discretion.

Finally, had the case not been removed to federal court, Plaintiff would have been entitled, as a matter of law, to have any decisions of the trial judge reviewed by a duly constituted state appellate court. Petitioner would have had an appeal, as a matter of right, to the Georgia Court of Appeals and a right to petition the state's highest court directly for certiorari. Here, the Eleventh Circuit circumvented that otherwise existing right in its entirety. This case, like *Erie*, its predecessor of 60 years ago, raises substantial issue of state sovereignty. When should a federal court certify? What is the appropriate standard of review for granting or refusing to grant certification? Does a litigant have a constitutional right to obtain review from a state's highest court pursuant to the Tenth Amendment? All of these questions are raised by the instant appeal and should be answered by this court, particularly in view of modern certification procedures adopted by so many states.

An increasingly mobile and technologically interconnected society will undoubtedly increase the number of cases in which opposing parties reside in different states. Thus, a corresponding increase in diversity jurisdiction cases can be expected. These

state law cases should be decided with the same standards and under the same law as cases filed in state courts. It may not be feasible to certify every single question, but particular guidance is needed to identify appropriate questions for certification and to ensure that lower federal courts know these standards. Therefore, a writ of certiorari should be granted in this case.

## CONCLUSION

This case presents a question of exceptional importance, namely when lower federal courts should certify state law questions to the state's highest court. Over 60 years ago this court held that state law, and not some general federal common law, should govern diversity lawsuits. The question remains, however, as to the method of applying state law in view of the avenue of certification provided by so many states today. This court should address those methods and establish standards by which lower courts may govern such questions.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 10, 2001**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 00-16763
Non-Argument Calendar

D.C. Docket No. 99-00156-CV-HLM-4

TONYA CAMP,

Plaintiff-Appellee-Cross-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Northern District of Georgia

(September 10, 2001)

Before EDMONDSON, CARNES, and WILSON, Circuit Judges.

PER CURIAM:

Wal-Mart Stores, Inc. appeals from the district court's denial of its renewed motion for judgment as a matter of a

law, Fed. R. Civ. P. 50(b), which upheld a jury verdict awarding Tonya Camp $125,000 in compensatory and punitive damages on her claims for malicious prosecution and false imprisonment. Camp cross-appeals the district court's grant of summary judgment in favor of Wal-Mart on her claim for intentional infliction of emotional distress.

## I. BACKGROUND

The evidence when viewed in the light most favorable to Camp[1] shows that, on April 20, 1998, Camp shopped at a Wal-Mart store in Cartersville, Georgia with her four-month old daughter, who she secured in an automobile child safety seat which she placed in the main compartment of her shopping cart. Among the items Camp picked up that day was a bottle of cologne, which she placed inside the shopping cart's "seat" compartment (the compartment next to the cart's handle), in between her purse and her daughter's diaper bag.

Once Camp arrived at the checkout counter, an unidentified Wal-Mart employee helped unload the items in her shopping cart. However, neither the employee or Camp removed three jars of baby food, which were inside the main compartment of the cart next to Camp's daughter, or the bottle of cologne from the shopping cart, despite the fact that those items were at all times in "plain view." Camp did not pay for the cologne or the three jars of baby food, though she did

1. We review a denial of a motion for a judgment as a matter of law *de novo*, applying the same standard as the district court. and viewing the evidence and all reasonable inferences in favor of the non-movant. *See Foley v. Luster*, 289 F.3d 1281, 1285 (11th Cir. 2001).

pay for the remaining items in her cart. After paying, she wheeled her cart — which contained the cologne and baby food that she had not paid for — through the store's sliding front doors and outside of the store's front entrance.

A Wal-Mart employee, Christie Cagle, saw Camp select the cologne from a store display and place it in her shopping cart. She also witnessed Camp proceed directly to the check-out counter, without selecting any more items for purchase, after Camp had selected the cologne. Cagle stood behind Camp in the check-out counter line and saw her fail to remove the cologne and the baby food from her shopping cart, and saw that she did not pay for those items. Once Camp was outside of the store, Cagle approached her and informed her that she had not paid for certain items. Camp then accompanied Cagle back into the store, and asked Cagle to speak to the Wal-Mart employee who had helped Camp unload her shopping cart at the check-out counter. Cagle refused to speak to the employee, though, and Camp was eventually arrested and charged with shoplifting. She was later tried by a jury and found not guilty.

## II. DISCUSSION

### A. MALICIOUS PROSECUTION AND FALSE IMPRISONMENT

The essence of a claim for malicious prosecution is a lack of probable cause. *See* O.C.G.A. § 51-7-40. Probable cause is absent "when the circumstances would satisfy a reasonable person that the accuser had no ground for proceeding except a desire to injure the accused." *K-Mart v.*

*Coker*, 410 S.E.2d 425, 426 (Ga. 1991). The issue in this case is whether there was a legally sufficient evidentiary basis for the jury to find that Wal-Mart had no ground for proceeding against Camp except a desire to injure her. We conclude that there was not.[2]

Section 16-8-14 of the Georgia Code states:

> A person commits the offense of theft by shoplifting when he . . . , with the intent of appropriating merchandise to his own use without paying for the same . . . does any of the following: (1) Conceals or takes possession of the goods or merchandise of any store or retail establishment. . . .

O.C.G.A. § 16-8-14. As the above provision indicates, criminal intent is a material element of shoplifting. However, a store employee need not divine the shopper's subjective intent before seeking an arrest and prosecution under the shoplifting statute, but may instead infer criminal intent from the "words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted." *Coker*, 410 S.E.2d at 427 (quoting O.C.G.A. § 16-26). The question, then, is whether Camp's conduct would "cause reasonably prudent persons to believe they had probable cause to prosecute [her] for the offense of shoplifting." *Id.* at 425.

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2. We note that in Georgia "malicious prosecution suits are disfavored and citizens are encouraged to bring justice to those who are apparently guilty." *Wal-Mart Stores v. Blackford*, 449 S.E.2d 293, 295 (Ga. 1994).

*Appendix A*

Wal-Mart clearly had probable cause to prosecute Camp for shoplifting. A Wal-Mart employee, Cagle, saw Camp pick up a bottle of Cologne, place it in her shopping cart between her purse and her daughter's diaper bag, and proceed directly to the check-out counter without picking up any other items. Once at the check-out counter, Cagle witnessed Camp's failure to remove the cologne and three jars of baby food from the her shopping cart, and her failure to pay for those items. Cagle also saw Camp transport the items outside of Wal-Mart's store.

The district court concluded that Wal-Mart's decision to prosecute Camp was a question for the jury, but we disagree. Camp "[took] possession of [Wal-Mart's] goods or merchandise," O.C.G.A. § 16-8-14, when she walked outside of the store with items she had not paid for, and Cagle could reasonably have inferred Camp's criminal intent to shoplift by her conduct. *See, e.g., Garmon v. Warehouse Groceries Food Ctr.*, 427 S.E.2d 308, 311-12 (Ga. Ct. App. 1993) (probable cause existed where store manager witnessed shopper place a plug of snuff that he had not paid for into his mouth, put the can of snuff in his back pocket, and proceed to the check out counter); *Arnold v. Eckerd Drugs, Inc.*, 358 S.E.2d 632 (Ga. Ct. App. 1987) (probable cause existed where shopper tripped an electronic anti-shoplifting device because she had forgotten that she had placed in her pocket a pen which she had not paid for); *Nunnally v. Revco Disc. Drug Ctrs., Inc.*, 316 S.E.2d 608, 620 (Ga. Ct. App. 1984) (probable cause existed where store employee witnessed shopper place a coin purse in her pocket and exit the store without paying for the purse); *see also* O.C.G.A. § 51-7-61 (activation of an antishoplifting device by the shopper constitutes probable cause for detention).

It is true that, under Georgia law, probable cause may be lacking where a reasonable person would be required to investigate further before initiating the shopper's arrest and prosecution. *See Simmons v. Kroger Co.*, 463 S.E.2d 159, 161-62 (Ga. Ct. App. 1995). However, "[t]he defendant is not necessarily required to verify his information, where it appears to be reliable." *McGonagil v. Treadwell*, 456 S.E.2d 260, 264 (Ga. Ct. App. 1995). Wal-Mart had reliable information that Camp was shoplifting. Cagle herself witnessed Camp's conduct, and Camp concedes that she walked out of Wal-Mart's store without paying for the cologne and the three jars of baby food. Camp's sole defense pertains to her subjective intent. But, as we explained above, the store employee need not determine the shopper's subjective intent before seeking an arrest or prosecution. *See Coker*, 410 S.E.2d at 425; *Garmon*, 427 S.E.2d at 313-14.

Further, we fail to see how an investigation would have revealed any facts that would have corroborated Camp's claims regarding her subjective intent. Cagle actually stood behind Camp in line at the check out counter and witnessed the unidentified Wal-Mart employee help Camp unload her shopping cart. It is unclear what, if anything, Cagle would have learned regarding Camp's subjective intent had she questioned that employee before arresting and prosecuting Camp. *See Garmon*, 427 S.E.2d at 313-14 (no further duty to investigate before arrest and prosecution for shoplifting where "there exists no . . . evidence which might have been examined, during the course of an additional investigation, which could have further corroborated appellant's vocal claims regarding his subjective intent"); *cf. Bi-Lo, Inc. v. McConnell*, 404 S.E.2d 327, 329 (Ga. Ct. App. 1991)

(investigation required because "even the most cursory investigation would have revealed" facts exonerating the plaintiff of the shoplifting charge). A further investigation by Wal-Mart was not required in these circumstances.

Viewing the evidence in the light most favorable to Camp, as we are required, we conclude that Wal-Mart had probable cause to arrest and prosecute her for shoplifting. Accordingly, we reverse the judgment of the district court denying Wal-Mart's renewed motion for judgment as a matter of law on Camp's malicious prosecution claim. For the same reason, we also reverse the district court judgment with respect to Camp's false imprisonment claim. Liability for false imprisonment depends on the absence of probable cause, *see Corporate Property Investors v. Milon*, __ S.E.2d __, 2001 WL 477144, * 4 (Ga. Ct. App. 2001), and, as we explained above, there was no legally sufficient evidentiary basis for the jury to find that Wal-Mart lacked probable cause to detain and arrest Camp.[3]

## B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Camp in her cross-appeal contends that the district court erred in granting summary judgment in favor of Wal-Mart on her claim for intentional infliction of emotional distress. However, we agree with the district court that Camp has

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3. Because we conclude that Wal-Mart was entitled to judgment as a matter of law on Camp's malicious prosecution and false imprisonment claims, which were the only claims submitted to the jury, we need not decide the merits of Wal-Mart's remaining arguments on appeal, which all involve issues of damages.

provided no evidence that Wal-Mart's actions were "of such serious import as to naturally give rise to such intense feelings of humiliation, embarrassment, fright, or extreme outrage as to cause severe emotional distress." *Gordon v. Frost*, 388 S.E.2d 363, 365-66 (Ga. Ct. App. 1989) (citation omitted); *cf. K-Mart Corp. v. Lovett*, 525 S.E.2d 751, 754 (Ga. Ct. App. 1999) (intentional infliction of emotional distress claim lies where store employee admitted she did not suspect the plaintiff of shoplifting, yet had her arrested for shoplifting anyway). Accordingly, we conclude that the district court properly granted summary judgment in favor of Wal-Mart on Camp's claim for intentional infliction of emotional distress.

## III. CONCLUSION

We **AFFIRM** the district court's grant of summary judgment in favor of Wal-Mart on Camp's intentional infliction of emotional distress claim. We **REVERSE** the judgment in favor of Camp on the malicious prosecution and false imprisonment claims, and **REMAND** this case to the district court with instructions to enter judgment in favor of Wal-Mart.

## APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION DATED, FILED AND ENTERED AUGUST 16, 2000

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ROME DIVISION**

CIVIL ACTION FILE
NO. 4:99-cv-156-HLM

TONYA CAMP,

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant.

**JUDGMENT ON JURY VERDICT**

This action came on for trial before a jury and the Court, the Honorable Harold L. Murphy, U.S. District Judge presiding. The issues of both compensatory damages and punitive damages having been presented, and the jury having rendered its verdicts, it is

**Ordered and Adjudged** that the plaintiff, Tonya Camp, recover of the defendant, Wal-Mart Stores, Inc. the sum of twenty-five thousand and 00/100 Dollars ($25,000.00), compensatory damages, and the sum of one hundred thousand

and 00/100 Dollars ($100,000.00), for punitive damages with interest thereon at the rate as provided by law, together with her costs.

LUTHER D. THOMAS
CLERK OF COURT

By: s/ Samuel M. Johnston
Samuel M. Johnston
Deputy Clerk

**APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION DATED AND FILED OCTOBER 22, 2001**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16763-FF

TONYA CAMP,

Plaintiff-Appellee-Cross-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before: EDMONDSON, CARNES and WILSON, Circuit Judges.

BY THE COURT:

Appellee's motion to certify question to the Georgia Supreme Court is DENIED.

**APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 5, 2001**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 00-16763-FF

TONYA CAMP,

Plaintiff-Appellee-Cross-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, CARNES and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE